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No. 02-1192

In the Supreme Court of the United States

COOPER INDUSTRIES, INC., PETITIONER

v.

AVIALL SERVICES, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

THEODORE B. OLSON
Solicitor General
Counsel of Record

THOMAS L. SANSONETTI
Assistant Attorney General

THOMAS G. HUNGAR
Deputy Solicitor General

JEFFREY BOSSERT CLARK
Deputy Assistant Attorney General

JEFFREY P. MINEAR
Assistant to the Solicitor General

R. JUSTIN SMITH
PAUL S. WEILAND
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether a party that is potentially liable under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9601 *et seq.*, for cleanup of property contaminated by hazardous substances, but has not been sued under CERCLA to undertake or to pay for the cost of the cleanup, may nevertheless seek contribution under CERCLA from other jointly responsible parties.

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INTEREST OF THE UNITED STATES

The United States has responsibility for implementing and enforcing the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9601 *et seq.*, which provides mechanisms for responding to the improper disposal of hazardous substances. The United States Environmental Protection Agency (EPA) has primary responsibility for administering CERCLA's cleanup authorities. See 42 U.S.C. 9604(a); Exec. Order No. 12,580, 3 C.F.R. 193 (1988). EPA and other federal agencies, which are subject to CERCLA requirements and are potentially responsible parties at a number of sites, have programs that implement cleanups. CERCLA's contribution provisions are an important component of the CERCLA scheme. The United States, which at the Court's invitation filed a brief amicus curiae in response to the petition for a writ of certiorari, accordingly has a substantial interest in this case.

STATEMENT

Aviall Services, Inc., sued Cooper Industries, Inc., in the United States District Court for the Northern District of Texas to recover expenses that Aviall has incurred in cleaning up property that Aviall purchased from Cooper. Aviall asserted that Section 107 of CERCLA, 42 U.S.C. 9607, subjects Aviall and Cooper to joint and several liability for the cleanup, and it claimed that Section 113(f)(1) of CERCLA, 42 U.S.C. 9613(f)(1), therefore renders Cooper liable to Aviall for contribution. The district court dismissed that claim, ruling that, unless and until Aviall is itself subject to suit under CERCLA, it cannot seek contribution from other potentially liable parties. Pet. App. 90a-100a. A divided panel of the court of appeals affirmed that judgment. *Id.* at 47a-89a. The en banc court of appeals, in a divided decision, vacated the panel's judgment and reversed. *Id.* at 9a-45a.

A. The CERCLA Liability Scheme

Congress enacted CERCLA in 1980 in response to the serious environmental and health dangers posed by property contaminated by hazardous substances. *United States* v. *Bestfoods*, 524 U.S. 51, 55 (1998). CERCLA, as amended and expanded through the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613, "grants the President broad power to command government agencies and private parties to clean up hazardous waste sites." *Key Tronic Corp.* v. *United States*, 511 U.S. 809, 814 (1994). It "both provides a mechanism for cleaning up hazardous waste sites, and imposes the costs of the cleanup on those responsible for the contamination." *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1, 7 (1989) (citations omitted); see also H.R. Rep. No. 253, 99th Cong., 1st Sess. Pt. 3, at 15 (1985) ("CERCLA has two goals: (1) to provide for clean-up if a hazardous substance is released into the environment or if such release is threatened, and (2) to hold responsible parties liable for the costs of these clean-ups.").

CERCLA provides the President (acting primarily through the EPA, see Exec. Order No. 12,580, 3 C.F.R. 193 (1988)), with alternative means for cleaning up contaminated property. Section 104 of CERCLA authorizes EPA itself to undertake response actions designed to remove hazardous substances and provide appropriate cleanup, using the Hazardous Substance Superfund. See 42 U.S.C. 9604; see also *Bestfoods*, 524 U.S. at 55. Alternatively, Section 106(a) authorizes EPA to compel, by means of an administrative order or a request for judicial relief, the responsible parties to undertake response actions, which the government then monitors. See 42 U.S.C. 9606(a). Judicial challenges to the government's selection of response actions under Section 104 or the government's issuance of orders under Section 106(a) are subject to the limitations with respect to timing of review set out in Section 113(h) of CERCLA. See 42 U.S.C. 9613(h).

Whether the United States proceeds under Section 104 or Section 106(a), the United States may recover its response costs from responsible parties through a cost recovery action under Section 107(a). See 42 U.S.C. 9607(a). Section 107(a) authorizes the United States, as well as other entities, to seek recovery of cleanup costs from four categories of "covered persons"—typically referred to as "potentially responsible parties" or "PRPs"—associated with the release or threatened release of hazardous substances. 42 U.S.C. 9607(a). Those entities are:

> (1) owners and operators of facilities at which hazardous substances are located;
>
> (2) past owners and operators of such facilities at the time hazardous substances were disposed of;

(3) persons who arranged for disposal or treatment of hazardous substances; and

(4) certain transporters of hazardous substances to the site.

See 42 U.S.C. 9607(a)(1)-(4). Congress has broadly defined the pertinent statutory terms—including "facility," "hazardous substance," "owner or operator," "person," "release," "transport," and "disposal"—to reach a wide range of entities and activities. See CERCLA § 101(9), (14), (20)-(22), (26) and (29), 42 U.S.C. 9601(9), (14), (20)-(22), (26) and (29).

Section 107(a) of CERCLA specifically provides that the United States, individual States, and Indian tribes are entitled to recover from covered persons "all costs of removal or remedial action incurred" that are "not inconsistent with the national contingency plan." CERCLA § 107(a)(1)-(4)(A), 42 U.S.C. 9607(a)(1)-(4)(A). The national contingency plan consists of federal regulations that prescribe the procedure for conducting hazardous substance cleanups under CERCLA and other federal laws. See CERCLA § 105, 42 U.S.C. 9605; 40 C.F.R. Pt. 300; see also CERCLA § 101(23)-(24) and (31), 42 U.S.C. 9601(23)-(24) and (31); Clean Water Act (CWA) § 311(c) and (d), 33 U.S.C. 1321(c) and (d). At a substantial number of contaminated sites, States have primary responsibility for cleanup or associated oversight. States may seek to recover their costs through Section 107(a), or they may undertake or compel cleanups and seek to recover their costs under state law. See, *e.g.*, Tex. Health & Safety Code Ann. §§ 361.181 *et seq.* (West 2001 & 2004 Supp.).

Congress has provided for coordination of federal cleanup efforts under Sections 104, 106, and 107, and state cleanup efforts under Section 107 and state law, through the Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, 115 Stat. 2356 (2002) (Brownfields Act).

The Brownfields Act encourages cleanup and reuse of contaminated or potentially contaminated property by expanding protection from CERCLA liability in certain circumstances, see, *e.g.*, CERCLA § 107(*o*)-(q), 42 U.S.C. 9607(*o*)-(q), and authorizing EPA to establish and administer grant programs for site assessment and reuse, CERCLA §§ 104(k), 128(a), 42 U.S.C. 9604(k), 9628(a). The Brownfields Act places heightened reliance on state response programs by, for example, restricting the ability of the federal government to take an enforcement action under Section 106(a) or to file a cost recovery action under Section 107(a) in prescribed circumstances. See CERCLA § 128(b), 42 U.S.C. 9628(b).

CERCLA authorizes entities other than the United States, individual States, and Indian tribes to recover their costs of cleaning up contaminated property under certain circumstances. For example, a party that complies with a government order under Section 106(a) to respond to an actual or threatened release of hazardous substances may petition the government for reimbursement of its expenses on the ground that it is not liable for the response costs or that the government's decision in selecting a response action was arbitrary and capricious or otherwise not in accordance with law. See CERCLA § 106(b), 42 U.S.C. 9606(b). If the government denies the petition, the party may file a judicial action seeking reimbursement. See CERCLA § 106(b)(2)(B), 42 U.S.C. 9606(b)(2)(B).

In addition, Section 107 of CERCLA provides that persons "other" than the United States, an individual State, or an Indian tribe may recover "any other necessary costs of response" that are incurred "consistent with the national contingency plan." CERCLA § 107(a)(1)-(4)(B), 42 U.S.C. 9607(a)(1)-(4)(B). The courts of appeals have ruled that persons who are not themselves liable may clean up contaminated property and then invoke this provision to seek reimbursement from the same four categories of potentially

liable parties that are subject to government cleanup actions.[1] The courts of appeals have uniformly concluded, however, that a person who falls within one of those four categories cannot rely on Section 107(a) to seek full cost recovery on a theory of joint and several liability from another jointly liable party; rather, a party that is subject to CERCLA liability is limited to seeking contribution from other jointly liable parties in accordance with Section 113(f).[2]

Section 113(f), which Congress added as part of SARA in 1986, explicitly addresses when a potentially liable party may seek contribution. See 42 U.S.C. 9613(f). Section 113(f)(1) provides in pertinent part:

> Any person may seek contribution from any other person who is liable or potentially liable under [Section 107(a)], during or following any civil action under [Section 106] or under [Section 107(a)]. * * * Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under [Section 106] or [Section 107].

[1] See *In re Reading Co.*, 115 F.3d 1111, 1120 (3d Cir. 1997); *Rumpke, Inc.* v. *Cummins Engine Co.*, 107 F.3d 1235, 1241-1242 (7th Cir. 1997); *Redwing Carriers, Inc.* v. *Saraland Apartments*, 94 F.3d 1489, 1496 (11th Cir. 1996); *United Techs. Corp.* v. *Browning-Ferris Indus.*, 33 F.3d. 96, 100 (1st Cir. 1994), cert. denied, 513 U.S. 1183 (1995); *Akzo Coatings, Inc.* v. *Aigner Corp.*, 30 F.3d 761, 764 (7th Cir. 1994).

[2] See, *e.g.*, *Bedford Affiliates* v. *Sills*, 156 F.3d 416, 423-425 (2d Cir. 1998); *Centerior Serv. Co.* v. *Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 356 (6th Cir. 1998); *Pneumo Abex Corp.* v. *High Point, Thomasville & Denton R.R.*, 142 F.3d 769, 776 (4th Cir.), cert. denied, 525 U.S. 963 (1998); *Pinal Creek Group* v. *Newmont Mining Corp.*, 118 F.3d 1298, 1301 (9th Cir. 1997), cert. denied, 524 U.S. 937 (1998); *New Castle County* v. *Halliburton NUS Corp.*, 111 F.3d 1116, 1121-1123 (3d Cir. 1997); *Redwing Carriers*, 94 F.3d at 1496; *Control Data Corp.* v. *S.C.S.C. Corp.*, 53 F.3d 930, 935 (8th Cir. 1995); *United States* v. *Colorado & E. R.R.*, 50 F.3d 1530, 1534-1536 (10th Cir. 1995); *United Techs. Corp.*, 33 F.3d at 103; *Akzo Coatings*, 30 F.3d at 764.

42 U.S.C. 9613(f)(1). Section 113(f)(2) additionally states that a party that resolves its liability to the United States or a State through an administrative or judicially approved settlement shall not be subject to contribution "regarding matters addressed in the settlement." 42 U.S.C. 9613(f)(2). Section 113(f)(3)(B) further provides:

> A person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not party to a settlement referred to in paragraph (2).

42 U.S.C. 9613(f)(3)(B); see CERCLA § 122, 42 U.S.C. 9622.[3] The central issue before the Court in this case is whether Section 113(f) authorizes a party that is potentially subject to CERCLA liability, but has not been sued under Section 106 or 107(a) of CERCLA and has not resolved its CERCLA liability through an administrative or judicially approved settlement, to seek contribution under CERCLA from another jointly liable party.

B. The Facts and Proceedings Below

Aviall provides aircraft maintenance services. In 1981, it purchased Cooper's aircraft engine maintenance business

[3] Section 122(a) authorizes the President (or his delegate) to enter into an agreement with persons (including responsible parties) to perform response actions if the President determines such action will be done properly by such person. 42 U.S.C. 9622(a). Section 122(d) provides that agreements with respect to remedial actions, other than "de minimis settlements" under Section 122(g), shall generally be entered in the appropriate United States district court as a consent decree. 42 U.S.C. 9622(d); see 42 U.S.C. 9622(g). Section 122(g) "de minimis settlements," 42 U.S.C. 9622(g), and Section 122(h) settlements, reached by the head of any department or agency with authority to undertake response action, 42 U.S.C. 9622(h), may be embodied in an administrative order. See CERCLA § 122(i), 42 U.S.C. 9622(i).

through an asset purchase agreement. Aviall later discovered hazardous substance contamination, allegedly arising from the activities of both Aviall and Cooper, at Texas facilities acquired from Cooper. Aviall notified Texas environmental authorities of the contamination. Those authorities confirmed that Aviall was in violation of state environmental laws and directed the company to take corrective action. In 1984, Aviall commenced cleanup activities, and, in 1995, it contacted Cooper seeking reimbursement for the response costs. Aviall later sold the facilities, but remained contractually responsible for the cleanup. Pet. App. 10a, 48a, 91a.

Aviall commenced this action against Cooper in federal district court to obtain recovery of its cleanup expenditures. Aviall's complaint alleged that Cooper had breached its contractual and warranty obligations under the asset purchase agreement. Pet. App. 91a-92a. In addition, although neither the United States nor Texas had sued Aviall to compel cleanup or to recover response costs, Aviall asserted that Cooper was liable to Aviall for contribution under Section 113(f) of CERCLA and Texas law. *Ibid.* The CERCLA contribution claim provided the sole basis for federal jurisdiction. *Id.* at 98a-99a.

The district court rejected Aviall's CERCLA contribution claim. The court concluded that "[t]he plain language of § 113(f)(1) provides that contribution claims may only be brought '*during* or *following* any civil action under [§ 106] or under [§ 107(a)].' (emphasis added)." Pet. App. 94a. The court additionally concluded that the last sentence of Section 113(f)(1) is merely a savings clause that preserves independent contribution remedies so that "parties who cannot fulfill the prerequisites of § 113(f)(1) are not precluded from bringing contribution claims that are otherwise available, such as under state law." *Ibid.* The district court accordingly dismissed Aviall's CERCLA contribution claim, but without prejudice in the event that a Section 106 or 107 action were

brought against Aviall in the future. *Id.* at 97a-98a & n.4. The court declined to retain federal jurisdiction over the remaining state law claims. *Id.* at 99a-100a.

A divided panel of the court of appeals affirmed. Pet. App. 47a-89a. The majority concluded that, "as a matter of statutory text and structure, CERCLA requires a party seeking contribution to be, or have been, a defendant in a § 106 or § 107(a) action." *Id.* at 57a; see *id.* at 52a-56a. The majority, like the district court, construed the final sentence of Section 113(f)(1) as merely a "savings clause" that preserved independent bases for contribution, such as Aviall's contribution claims against Cooper under Texas law. *Id.* at 56a. The majority also stated that the legislative history of CERCLA, prior CERCLA decisions, and the policy goals of CERCLA all supported its construction of the statutory text. *Id.* at 57a-66a. In contrast, the dissent reasoned that the first sentence of Section 113(f)(1) does not categorically require that a party seek contribution in response to a Section 106 or 107(a) action and that the final sentence of Section 113(f) explicitly authorizes a party to seek contribution in the absence of such suits. *Id.* at 66a-78a The dissent also stated that the legislative history, case law, and policy arguments supported its construction. *Id.* at 78a-89a.

The court of appeals granted Aviall's petition for rehearing en banc. Pet. App. 46a. The en banc court, by a divided vote, reversed the judgment of the district court. *Id.* at 9a-45a. The majority adopted the reasoning of the panel dissent and concluded:

> [S]ection 113(f)(1) does not constrain a PRP for covered pollutant discharges from suing other PRPs for contribution only "during or following" litigation commenced under sections 106 or 107(a) of CERCLA. Instead, a PRP

> may sue at any time for contribution under federal law to recover costs it has incurred in remediating a CERCLA site. Section 113(f)(1) authorizes suits against PRPs in both its first and last sentence which states without qualification that "nothing" in the section shall "diminish" any person's right to bring a contribution action in the absence of a section 106 or section 107(a) action.

Id. at 13a-14a. Three judges dissented, concluding that "the plain language and statutory structure of CERCLA's contribution provisions demonstrate that the contribution remedy in § 113(f)(1) requires a prior or pending § 106 or § 107 action." *Id.* at 41a-42a.[4]

SUMMARY OF ARGUMENT

Section 113(f)(1) of CERCLA provides that a party that is jointly liable for response costs under CERCLA may seek contribution from other liable parties, but only "during or following" a Section 106 or Section 107(a) civil action that would quantify and resolve that liability. Section 113(f)(1)'s text squarely resolves the issue before the Court. To the extent that extra-textual authority is relevant, it confirms the plain meaning of the statutory language.

A. Section 113(f)(1) states that a person who is liable or potentially liable under Section 107(a) of CERCLA may seek contribution from a jointly liable person "during or following" any civil action under Section 106 or Section 107(a). 42 U.S.C. 9613(f)(1). That textual limitation on the scope of

[4] A number of courts have discussed the scope of Section 113(f)(1) in the wake of the panel and en banc decisions. Those courts have not reached consistent results. See, *e.g.*, *Western Properties Serv. Corp.* v. *Shell Oil Co.*, No. 01-55676 (9th Cir. Feb. 13, 2004); *E.I. DuPont De Nemours & Co.* v. *United States*, No. 97-497, 2003 WL 23104700 (D.N.J. Dec. 30, 2003); *Pfohl Bros. Landfill Site Steering Comm.* v. *Allied Waste Sys., Inc.*, 255 F. Supp. 2d 134 (W.D.N.Y. 2003); *1325 "G" Street Assocs. LP* v. *Rockwood Pigments NA, Inc.*, 235 F. Supp. 2d 458 (D. Md. 2002); *City of Waukesha* v. *Viacom, Inc.*, 221 F. Supp. 2d 975 (E.D. Wis. 2002).

contribution under CERCLA reveals, in clear and unambiguous terms, that Section 113(f)(1) does not authorize a contribution action in the absence of an ongoing or completed Section 106 or 107(a) civil action. Section 113(f)(1)'s savings clause, which states that nothing in Section 113(f) "shall diminish the right" of any person to seek contribution in the absence of a Section 106 or 107(a) action, merely preserves any independent right the person may have, apart from Section 113(f), to seek contribution, but does not itself give rise to any right of contribution.

B. Section 113(f)(1)'s text is consistent with the traditional understanding of the legal concept of contribution. The courts have consistently recognized that a person seeking contribution must extinguish—through a pending or completed lawsuit or through settlement—the joint liability that provides the basis for the contribution claim. Section 113(f)(1) adopts that traditional limitation by providing that contribution may be sought "during or following" a Section 106 or 107(a) action that would quantify and resolve the underlying liability.

C. Section 113(f)(1)'s plain language meshes with CERCLA's liability scheme and creates a coherent mechanism for apportioning cleanup costs among jointly liable parties. The courts of appeals have consistently ruled that Section 107(a)(1)-(4)(B) allows a liable party to obtain a recovery of response costs from another jointly liable party through a contribution action brought in accordance with Section 113(f). Section 113(f)(1) allows contribution "during or following" a Section 106 or 107(a) civil action, and Section 113(f)(3)(B) allows contribution after an administrative or judicially approved settlement that resolves liability to the United States or a State. Section 113(g), in turn, specifies a limitation period for those two alternative situations. But neither Section 113(f) nor Section 113(g) provides for a contribution action in the absence of a Section 106 or 107(a)

action or a settlement of the underlying liability, thus confirming that Congress did not implicity authorize contribution in those circumstances.

D. Section 113(f)(1)'s text is also consistent with CERCLA's legislative history. The legislative history of the 1986 amendments—commonly known as SARA—that produced Section 113(f) leaves no doubt that Congress's object was to provide contribution during or following a Section 106 or 107(a) action or after a CERCLA-based settlement. The Senate and House reports supporting the respective chambers' proposed bills speak specifically to that objective. By contrast, they reveal no intent to allow contribution in the absence of an ongoing or completed CERCLA suit or an administratively or judicially approved settlement.

E. Although the en banc court of appeals acknowledged the primacy of Section 113(f)(1)'s text, it ultimately neglected Section 113(f)(1)'s plain language in favor of unpersuasive extra-textual considerations. The court of appeals mistakenly relied on the pre-SARA version of CERCLA, the unarticulated assumptions of other lower courts, and "policy considerations." Congress expressed its intent through Section 113(f)(1)'s text, and that text authorizes a liable party to seek contribution only "during or following" a Section 106 or 107(a) civil action.

ARGUMENT

SECTION 113(f)(1) OF CERCLA AUTHORIZES A JOINTLY LIABLE PARTY TO SEEK CONTRIBUTION ONLY "DURING OR FOLLOWING" A CIVIL ACTION UNDER CERCLA THAT RESOLVES THAT LIABILITY

Section 113(f)(1) provides a party that is jointly liable for response costs under CERCLA with a right to contribution, but only "during or following" a Section 106 or Section 107(a) civil action that would quantify and resolve that liability.

Section 113(f)(1)'s savings clause does not negate that express limitation, but instead merely preserves whatever additional rights to contribution a party may have under other laws. Section 113(f)(1)'s plain language, by itself, is dispositive, and, in any event, the full spectrum of potentially relevant supplementary authorities confirms that Section 113(f)(1) means what it says.

A. Section 113(f)(1) Makes Clear That A Party May Seek Contribution Under CERCLA Only "During Or Following" A Civil Action Under Section 106 Or Section 107(a)

This Court has repeatedly emphasized that, "when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Lamie* v. *United States Trustee*, 124 S. Ct. 1023, 1030 (2004); *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000). Section 113(f) plainly resolves the question whether a party that is potentially liable under CERCLA, but has not been sued under CERCLA to undertake or pay for the cost of the cleanup, may nevertheless seek contribution from another responsible party.

CERCLA subjects parties that have contributed to the release or threatened release of hazardous substances to liability for the resulting response costs. CERCLA §§ 106, 107(a), 42 U.S.C. 9606, 9607(a). Sections 106 and 107(a), which operate against a "venerable common-law backdrop," *Bestfoods*, 524 U.S. at 62, impose joint and several liability in accordance with common law principles unless the defendant can demonstrate that the harm from the release of hazardous substances is divisible. Section 113(f) provides a corresponding statutory right of contribution from other jointly liable

parties. CERCLA § 113(f), 42 U.S.C. 9613(f). See *Key Tronic*, 511 U.S. at 816.[5]

Section 113(f)(1) of CERCLA explicitly identifies the circumstances in which a jointly liable party may seek contribution:

> Any person may seek contribution from any other person who is liable or potentially liable under [Section 107(a)], *during or following any civil action under [Section 106] or under [Section 107(a)]*.

42 U.S.C. 9613(f)(1) (emphasis added). Consistent with the traditional understanding of contribution principles, that provision expressly allows a jointly responsible party to seek contribution, but only "during or following" a Section 106 or Section 107(a) civil action that would quantify and resolve the joint liability that the party seeks to apportion among other responsible parties. *Ibid.*[6]

The court of appeals concluded that the first sentence of Section 113(f)(1) allows contribution actions in the absence of an ongoing or completed Section 106 or 107(a) action on the

[5] See, *e.g.*, *Centerior Serv.*, 153 F.3d at 348; *United States* v. *Alcan Aluminum Corp.*, 990 F.2d 711, 721-722 (2d Cir. 1993); *United States* v. *Alcan Aluminum Corp.*, 964 F.2d 252, 268-269 (3d Cir. 1992); *United States* v. *Kayser-Roth Corp.*, 910 F.2d 24, 26-27 (1st Cir. 1990), cert. denied, 498 U.S. 1084 (1991); *United States* v. *R.W. Meyer, Inc.*, 889 F.2d 1497, 1507 (6th Cir. 1989), cert. denied, 494 U.S. 1057 (1990); *United States* v. *Aceto Agric. Chems. Corp.*, 872 F.2d 1373, 1377 (8th Cir. 1989); *United States* v. *Monsanto Co.*, 858 F.2d 160, 167, 172 (4th Cir. 1988), cert. denied, 490 U.S. 1106 (1989).

[6] See, *e.g.*, *In re Reading Co.*, 115 F.3d at 1120 ("Although 'contribution' is nowhere defined within CERCLA, it is a term with a familiar and readily acceptable meaning. * * * As the Court of Appeals for the Seventh Circuit has described it, contribution denotes a claim 'by and between jointly and severally liable parties for an appropriate division of the payment one of them has been compelled to make.'" (quoting *Akzo Coatings, Inc.*, 30 F.3d at 764)); accord *United Techs. Corp.*, 33 F.3d at 99; see also *Colorado & E. R.R.*, 50 F.3d at 1535 n.4.

mistaken ground that, if Congress had not intended to authorize such actions, it would have provided that contribution actions shall "only" be brought during or following a Section 106 or Section 107(a) action. Pet. App. 24a-25a. Congress's intent, however, is clear from the plain language of the statutory text. Section 113(f)(1)'s permissive phrasing —a "person *may* seek contribution"—indicates that Congress intended to permit contribution claims to be brought when the stated prerequisites—namely, that contribution be sought "during or following" a Section 106 or Section 107(a) action—are satisfied. 42 U.S.C. 9613(f)(1) (emphasis added). It does *not* provide authorization for contribution claims where those prerequisites are *not* satisfied. The court of appeals' contrary interpretation would render the "during or following" requirement entirely superfluous, in violation of basic canons of statutory construction. See, *e.g.*, *Alaska Dep't of Envtl. Conservation* v. *EPA*, 124 S. Ct. 983, 1002 n.13 (2004); *Dole Food Co.* v. *Patrickson*, 123 S. Ct. 1655, 1661 (2003); *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253 (1992).[7]

The court of appeals also mistakenly relied (Pet. App. 25a-27a) on the last sentence of Section 113(f)(1), which provides:

> Nothing in this subsection shall *diminish the right* of any person to bring an action for contribution in the absence of a civil action under [Section 106] or [Section 107].

[7] Contrary to the court of appeals' suggestions, Section 113(f)(1)'s syntax is not "confused" and its grammar is not "inexact." Pet. App. 13a. Rather, Section 113(f)(1) speaks unambiguously through the familiar syntax and grammar that is routinely employed in granting a permissive, but limited, license. For example, a sign stating that "Visitors May Enter Through The Front Door During Normal Business Hours" informs the visitor that, if he wants to enter through the front door, he must do so during the prescribed period. It does not grant the visitor the right to use the front door at any time he wishes. See *id.* at 34a-35a (Garza, J., dissenting).

42 U.S.C. 9613(f)(1) (emphasis added). The court erroneously construed that sentence, which is clearly written in the form of a "savings" clause, as affirmatively creating a right to contribution. The specific terms of the savings provision, however, merely preserve any *independent* right to contribution that exists apart from Section 113(f)(1). See *United States* v. *Locke*, 529 U.S. 89, 105 (2000); see also *Atherton* v. *FDIC*, 519 U.S. 213, 227-228 (1997).

The court of appeals also suggested that Congress added the last sentence of Section 113(f)(1) to indicate that the federal courts "had been right," in CERCLA cases decided before Congress added Section 113(f)(1) through the 1986 SARA amendments, in engrafting an implied federal common law right of contribution onto CERCLA. Pet. App. 26a. The court's reasoning, however, rests on a mistaken understanding of the pre-SARA caselaw and, in any event, is unpersuasive. As the First Circuit has explained, the pre-SARA courts were divided on the question whether there was an implied right to contribution under CERCLA. *United Techs. Corp.* v. *Browning-Ferris Indus.*, 33 F.3d 96, 100 (1994), cert. denied, 513 U.S. 1183 (1995). Those lower courts that did recognize such a right employed the term "contribution" in its "traditional sense" to denote "a claim 'by and between jointly and severally liable parties for an appropriate division of the payment one of them *has been compelled to make*.'" *Id.* at 99, 100-101 (emphasis added). See note 6, *supra*.

In order to eliminate any uncertainty regarding the availability of contribution under CERCLA, Congress squarely addressed that question in SARA. That 1986 Act expressly delineated the circumstances in which contribution would thereafter be available under CERCLA by providing, in the first sentence of Section 113(f)(1), that contribution may be sought "during or following" a Section 106 or 107(a) action. Congress clearly did *not* codify the much broader version of

"contribution" adopted by the court below. Indeed, the existence of any such broader "contribution" remedy under CERCLA is necessarily foreclosed by the first sentence of Section 113(f)(1). It would have been pointless for Congress to create an explicitly limited right to contribution "during or following" a Section 106 or 107(a) action if, at the same time, the "savings" clause was implicitly establishing or incorporating an all-encompassing "contribution" remedy that would extend to *all* persons potentially liable under Section 106 or 107(a).

Thus, "the existing statutory text" precisely defines the contribution remedy, and there is no need or warrant to draw inferences from "predecessor statutes." *Lamie*, 124 S. Ct. at 1030. If Congress had intended to create an even broader form of contribution, it would have written the first sentence of Section 113(f)(1) to accomplish that result. It would not have perpetuated the pre-SARA uncertainty by depending on courts to fashion a novel form of contribution, foreign to traditional legal understanding, through Section 113(f)(1)'s savings clause. See, *e.g.*, *Morissette* v. *United States*, 342 U.S. 246, 263 (1952) ("absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them").

B. Section 113(f)(1)'s Text Is Consistent With The Traditional Understanding Of Contribution

Because Congress enacted Section 113(f)(1) against a "venerable common-law backdrop," *Bestfoods*, 524 U.S. at 62, Section 113(f)(1)'s plain language embodies the traditional legal concept of contribution. Section 113(f)(1) reflects the general understanding, firmly rooted at the time of SARA's enactment, that a right of contribution is available (1) when two or more persons are jointly liable for a debt or injury and (2) one of those persons has extinguished a disproportionate share of that liability. See, *e.g.*, *Northwest*

Airlines, Inc. v. *Transport Workers Union*, 451 U.S. 77, 87-88 (1981) ("Typically, a right to contribution is recognized when two or more persons are liable to the same plaintiff for the same injury and one of the joint tortfeasors *has paid* more than his fair share of the common liability." (emphasis added)); note 6, *supra*.[8]

As the Third Restatement of Torts explains, the right to contribution depends on the resolution of the underlying liability:

> A person seeking contribution must extinguish the liability of the person against whom contribution is sought for that portion of liability, either by settlement with the plaintiff or by satisfaction of judgment.

Restatement (Third) of Torts § 23 cmt. b. (2000). The Restatement recognizes that the party seeking contribution may pursue its claim at the same time that the underlying liability proceedings are underway:

> As permitted by procedural rules, a person seeking contribution may assert a *claim* for contribution and obtain a contingent judgment *in an action in which the person seeking contribution is sued by the plaintiff*, even though

[8] See also Restatement (Second) of Torts § 886A(1) and (2) (1979) ("[W]hen two or more persons become liable in tort to the same person for the same harm, there is a right of contribution among them * * *. The right of contribution exists only in favor of a tortfeasor who *has discharged the entire claim* for the harm by paying more than his equitable share of the common liability." (emphasis added)); Uniform Contribution Among Tortfeasors Act § 1(b), 12 U.L.A. 194 (1996) (1955 Revised Act) ("The right of contribution exists only in favor of a tortfeasor *who has paid more than his pro rata share of the common liability*." (emphasis added)); *Black's Law Dictionary* 297 (5th ed. 1979) ("Under principle of 'contribution,' a tortfeasor *against whom a judgment is rendered* is entitled to recover proportional shares of judgment from other joint tort-feasors whose negligence contributed to the injury and who were also liable to the plaintiff." (emphasis added)).

> the liability of the person against whom contribution is sought has not yet been extinguished.

Ibid. (second emphasis added) See also *id.* at cmt. n. ("Contribution may normally be recovered in a third-party claim in the suit in which the person seeking contribution is sued by the plaintiff or in a separate suit."). But the traditional concept of contribution does not envision that a party may seek contribution when there is no final judgment or pending action underway that would determine and extinguish the joint liability unless the party has entered into a settlement that discharges that liability. *Id.* at comment b. See, *e.g.*, Uniform Contribution Among Tortfeasors Act § 3(d), 12 U.L.A. 251 (1996) (1955 Revised Act).

CERCLA explicitly adopts the traditional limitations on contribution by providing that contribution may be sought "during or following" a Section 106 or 107(a) action, CERCLA § 113(f)(1), 42 U.S.C. 9613(f)(1), or following an administrative or judicially approved settlement, CERCLA § 113(f)(3)(B), 42 U.S.C. 9613(f)(3)(B). But Section 113(f)(1) does not allow contribution in the absence of a CERCLA suit that would quantify and resolve the liability that the party bringing the contribution action seeks to apportion among other jointly liable parties. 42 U.S.C. 9613(f)(1). Section 113(f)(1)'s unambiguous text conforms to the common law; it should not "be construed as making any innovation upon the common law which it does not fairly express." *Robert C. Herd & Co.* v. *Krawill Mach. Corp.*, 359 U.S. 297, 304-305 (1959) (quoting *Shaw* v. *Railroad Co.*, 101 U.S. 557, 565 (1879)); see, *e.g.*, *Field* v. *Mans*, 516 U.S. 59, 69 (1995).

C. Section 113(f)(1)'s Text Is Consistent With CERCLA As A Whole

This Court construes congressional enactments in light of "the cardinal rule that a statute is to be read as a whole." *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991). Section

113(f)(1)'s plain language meshes smoothly with CERCLA's carefully structured liability scheme. Section 113(f)(1), read as part of CERCLA's whole, creates a coherent and workable mechanism for ensuring that cleanup costs are properly apportioned among liable parties.

Section 107 of CERCLA authorizes recovery of response costs by private persons in specifically defined circumstances. Section 107(a)(1)-(4)(B) allows a person who is not liable for improper disposal of hazardous substances, but who nevertheless incurs cleanup costs, to recover the resulting costs from those persons who fall within CERCLA's four categories of liable parties. See 42 U.S.C. 9607(a)(1)-(4)(B). But the courts of appeals have uniformly concluded that Section 107(a)(1)-(4)(B) allows a liable party, such as Aviall, to obtain a recovery from another jointly liable party only through a contribution action under 113(f). See 42 U.S.C. 9607(a)(1)-(4)(B). See pp. 5-6 & nn. 1-2, *supra*.[9]

The courts of appeals have correctly recognized that, while Section 107(a)(1)-(4)(B)'s reference to "any person" is broad enough to allow one jointly liable party to sue another

[9] As the United States explained in its amicus curiae brief at the petition stage in this case (at 16-17 n.10), the federal government endorses the uniform conclusion of the courts of appeals that Section 107(a)(1)-(4)(B) does not provide an independent basis for a liable person to recover response costs from another liable person. See Amicus Brief for the United States at 10, *Pinal Creek Group* v. *Newmont Mining Corp.*, 118 F.3d 1298 (9th Cir. 1997), cert. denied, 524 U.S. 937 (1998) (No. 97-795). As the government noted in *Pinal Creek*, that understanding of the relationship between Sections 107 and 113 is consistent with this Court's observations in *Key Tronic* that Sections 107 and 113 provide related remedies. See 511 U.S. at 816 & n.7. To the extent that the Court's observations suggest that Section 107 alone could give rise to an independent right of contribution, that "passing dictum" (*SEC* v. *Edwards*, 124 S. Ct. 892, 898 (2004)) is inconsistent with the Court's analysis in *Lamie*, which recognized that statutes should be interpreted on the basis of the "existing statutory text." 124 S. Ct. at 1030. Here, the "existing statutory text" provides an express and specific contribution remedy, see CERCLA 113(f), 42 U.S.C. 9613(f), so there is no basis for inferring another.

for the former's response costs, that Section does not prescribe what form that liability should take. When read in combination, the clear implication of Section 107(a)(1)-(4)(B) and Section 113 is that the jointly liable party is limited to seeking contribution in the manner authorized by Section 113(f). That result avoids the anomaly of a jointly liable party suing another jointly liable party for the full costs of a CERCLA cleanup. It also ensures that parties who have settled with the government and received protection from "claims for contribution regarding matters addressed in the settlement," CERCLA § 113(f)(2), 42 U.S.C. 9613(f)(2), are not subject to double liability through a Section 107(a) suit on the theory that such a suit imposes an independent basis of liability apart from contribution See cases cited at note 2, *supra*.[10]

Section 113(f) designates the two avenues by which a liable party may recover its cleanup costs. Section 113(f)(1) expressly allows a liable party to seek contribution "during or following" a Section 106 or 107(a) civil action, while Section 113(f)(3)(B) expressly allows contribution after an administrative or judicially approved settlement that resolves liability to the United States or a State. See 42 U.S.C. 9613(f)(1) and (3)(B). Section 113(g)(3) provides two corresponding limitations periods:

[10] Since the early stages of this litigation, Aviall has predicated its contribution claim on the established understanding that Section 107(a) alone does not provide a sufficient basis for a liable party to recover cleanup costs and that a liable party must also satisfy the requirements of Section 113(f). See Pet. App. 94a ("Aviall has dropped the independent § 107(a) claim and instead asserts a so-called 'combined' § 107(a) and § 113(f)(1) claim."). Aviall is accordingly precluded from reversing its position below and arguing, in the face of overwhelming contrary precedent, that Section 107(a) would provide an independent basis for it to recover its cleanup costs from Cooper. See, *e.g.*, *Glover* v. *United States*, 531 U.S. 198, 205 (2001).

> No action for contribution for any response costs or damages may be commenced more than 3 years after –
>
> (A) the date of judgment in any action under [CERCLA] for recovery of such costs or damages, or
>
> (B) the date of an administrative order under [Section 122(g)] (relating to de minimis settlements) or [Section 122(h)] (relating to cost recovery settlements) or entry of a judicially approved settlement with respect to such costs or damages.

42 U.S.C. 9613(g)(3). See note 3, *supra* (describing Section 122(g) and (h)).

Section 113(g)(3)(A) accordingly provides a three-year limitations period for contribution actions brought "during or following" a Section 106 or 107(a) action, while Section 113(g)(3)(B) provides a three-year limitations period for contribution actions brought after the party has resolved its liability through an administrative or judicially approved settlement. Section 113(g)(3) does *not*, however, provide a limitations period for contribution actions in the absence of a Section 106 or 107(a) action or a qualifying settlement. Given the absence of any express textual basis for contribution in those circumstances, the omission of a statute of limitation that would govern such contribution claims provides further evidence that Congress did not intend to create a federal right to contribution in that situation. Rather Section 113(f)(1) means what it says and authorizes a contribution action only "during or following" a civil action under Section 106 or Section 107(a).[11]

[11] Section 106(a) authorizes the federal government to pursue both judicial actions and administrative orders "necessary to protect public health and welfare and the environment." 42 U.S.C. 9606(a). The panel majority below stated that issuance of a Section 106(a) administrative order is sufficient to trigger the right of contribution under Section 113(f)(1). See Pet. App. 57a n.5. That statement appears incorrect. Section 113(f)(1) authorizes contribution only "during or following any civil action" under Section 106 or Section 107(a), and the phrase "civil action" is commonly understood to mean a judicial proceeding. See, *e.g.*, Fed. R. Civ. P. 2. Accordingly, EPA's issuance of a Section 106(a) administrative order does not generally entitle the recipient to seek contribution under Section 113(f)(1).

D. Section 113(f)(1)'s Plain Language Is Consistent With CERCLA's Legislative History

Because Section 113(f)(1)'s language is clear, there is no need to consult its legislative history. See, *e.g.*, *Lamie*, 124 S. Ct. at 1033; *Salinas* v. *United States*, 522 U.S. 52, 57 (1997); *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997); *Connecticut Nat'l Bank*, 503 U.S. at 254; *Davis* v. *Michigan Dep't of Treasury*, 489 U.S. 803, 808 n.3 (1989); *Burlington N. R.R.* v. *Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987). Nevertheless, the legislative history confirms the plain meaning of the statutory text. The pertinent Senate and House bills that ultimately became SARA contained differently worded contribution provisions. But each chamber indicated that the object was to provide for contribution during or following a Section 106 or 107(a) action or after a CERCLA-based settlement.

The Senate bill initially provided that a contribution action may be brought "[a]fter judgment in any civil action under section 106 or under [section 107(a)]." See S. Rep. No. 11, 99th Cong., 1st Sess. 103 (1985) (proposed Section 107(*l*)(2)). The Senate report stated that "[t]his amendment clarifies and confirms the right of a person *held jointly and severally liable under CERCLA* to seek contribution from other potentially liable parties." *Id.* at 44 (emphasis added). The Senate later revised its proposed language through a floor amendment to allow contribution "during or following" a Section 106 or 107(a) action so that contribution claims could be resolved in one suit. See 131 Cong. Rec. 24,449 (1985). The sponsors explained that the floor amendment

would allow "any defendant in a Government enforcement action under CERCLA * * * to file a claim for contribution against others * * * *as soon as the enforcement action has been brought.*" *Id.* at 24,450 (Sen. Stafford) (emphasis added); see also *id.* at 24,452 (Sen. Thurmond); *id.* at 24,453 (Sen. DeConcini).

The House bill initially provided that "any defendant alleged or held to be liable in an action under section 106 or section 107" may bring a contribution action. See H.R. Rep. No. 253, 99th Cong., 1st Sess. Pt. 1, at 13 (1985) (proposed Section 113(g)(1)). Like the Senate report, the House report stated that the proposed language "clarifies and confirms the right of a person *held jointly and severally liable under CERCLA* to seek contribution from other potentially liable parties." *Id.* at 79 (emphasis added). The House Judiciary Committee later made minor "technical" changes to the House bill that "simply clarif[y] and emphasize[] that persons who settle with EPA (and who are therefore not sued), as well as defendants in CERCLA actions, have a right to seek contribution from other potentially responsible parties." H.R. Rep. No. 253, *supra*, Pt. 3, at 18.

The House-Senate conference, which produced the final language, adopted without further pertinent elaboration the Senate's "during or following" formulation and the House provisions allowing contribution following settlement. See H.R. Rep. No. 962, 99th Cong., 2d Sess. 37, 222 (1986). Thus, the legislative history confirms that Section 113(f)(1) states what Congress meant and means what it says. See *Connecticut Nat'l Bank*, 503 U.S. at 253-254.

E. The Court of Appeals' Construction Of Section 113(f)(1) Rests On Unpersuasive Extra-Textual Considerations

The en banc court of appeals acknowledged that "[s]tatutory construction begins with the plain language of a

statute." Pet. App. 12a. The court overlooked, however, that "where the statutory language provides a clear answer, it ends there as well." *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 438 (1999). The court's focus on the pre-SARA version of CERCLA, Pet. App. 14a-23a, the unarticulated assumptions of other courts, *id.* at 27a-30a, and "policy considerations," *id.* at 31a-33a, fails to give proper respect to the fundamental principle that statutory language provides the best guide to legislative intent. See *Rodriguez* v. *United States*, 480 U.S. 522, 525-526 (1987) (per curiam).

The court of appeals mistakenly attempted to draw inferences from the fact that the pre-SARA version of CERCLA contained no explicit provision for contribution, reasoning that Congress may have implicitly intended to ratify the pre-SARA case law. Pet. App. 14a-23a. As this Court has recently made clear:

> The starting point in discerning congressional intent is the existing statutory text, and not the predecessor statutes. It is well established that "when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd —is to enforce it according to its terms."

Lamie, 124 S. Ct. at 1030 (citations omitted). Because the "existing statutory text" of Section 113(f)(1) precisely answers the question presented here, there is no warrant for attempting to derive guidance from the pre-SARA "predecessor statute[]," which did not address the question of contribution at all.

The court of appeals also mistakenly attempted to derive guidance from unstated assumptions and "isolated dicta" in other lower court decisions that suggest, without deciding, that responsible parties may seek contribution in the absence of a Section 106 or Section 107(a) action. Pet. App. 27a-30a. Responsible parties may have assumed that Section

113(f)(1) provides a broader contribution remedy than its language would support, and it is possible that errant language in some government briefs may have nurtured that assumption. But even if that assumption had produced a substantial body of precedent (which it has not, see *id.* at 42a-43a (Garza, J., dissenting)), the courts have an obligation, when squarely faced with the issue, to interpret Section 113(f)(1) in light of its plain terms. See, *e.g.*, *Lexecon Inc.* v. *Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) ("If we do our job of reading the statute whole, we have to give effect to this plain command, * * * even if doing that will reverse the longstanding practice under the statute."); *Metropolitan Stevedore Co.* v. *Rambo*, 515 U.S. 291, 300 (1995) ("Age is no antidote to clear inconsistency with a statute." (citations omitted); see also *Federal Election Comm'n* v. *NRA Political Victory Fund*, 513 U.S. 88, 97 (1994).

The en banc court's policy considerations (Pet. App. 31a-33a) provide no basis for construing Section 113(f)(1) contrary to its plain terms. As a practical matter, the uniform view of the courts of appeals that a responsible party can seek reimbursement for response costs under CERCLA only through a contribution action, when coupled with Congress's decision to authorize contribution under CERCLA only "during or following" a Section 106 or 107(a) action or after settlement, imposes a coherent structure on the allocation of CERCLA response costs and a sensible limitation on CERCLA contribution actions. That construction makes clear that CERCLA does not create a federal cause of action under which responsible parties may sue each other at any time for costs they have incurred in cleaning up hazardous substances. Rather, a responsible party that satisfies its CERCLA liability to the government, through settlement or judgment, may obtain contribution from other responsible parties within a statutorily prescribed limitation period.

That construction also puts CERCLA in alignment with the traditional legal rules governing joint liability and contribution. See pp. 17-19, *supra*.[12]

To be sure, Congress might in the future make a legislative judgment that responsible persons who engage in cleanups in the absence of a Section 106 or 107(a) action or a qualifying settlement should also be able to recover their costs from other responsible persons. Such a remedy could further Congress's objective of facilitating "brownfields" cleanup and redevelopment.[13] But the court of appeals erred

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[12] See Restatement (Third) of Torts § 23 cmt. b (2000) ("A person seeking contribution must extinguish the liability of the person against whom contribution is sought for that portion of liability, either by settlement with the plaintiff or by satisfaction of judgment."). Section 113(f) does not prevent a responsible party from cleaning up a CERCLA site voluntarily and apportioning the costs among other responsible parties by first entering into a settlement to resolve its liability to the United States or a State. If a party enters into such a settlement, it would then be immune from contribution claims regarding matters addressed in the settlement, and it would have the express right to seek contribution from non-settling responsible parties, based on its discharge of the joint liability through the settlement. See CERCLA § 113(f)(2) and (3), 42 U.S.C. 9613(f)(2) and (3); see also 40 C.F.R. 300.700(g). Alternatively, a responsible party may also pursue the cost recovery mechanisms available under state law. See, *e.g.*, Tex. Health & Safety Code Ann. § 361.344 (West 2001).

[13] There are many contaminated sites nationwide—by one estimate, as many as 450,000. See U.S. General Accounting Office, *Community Development: Local Growth Issues—Federal Opportunities and Challenges* (RCED-00-178) 118 (Sept. 2000). Because government resources are limited, private parties have played, and will continue to play, a prominent role in cleaning up many of those sites. EPA estimates that state and local brownfields programs have yielded more than $5.1 billion in largely private funding for brownfields cleanup and redevelopment. In many instances, those cleanups have proceeded with minimal government involvement. A future Congress could accordingly conclude that allowing responsible parties to obtain cost recovery from other responsible parties in the absence of a CERCLA action or settlement, and subject to appropriate limitations, may result in more efficient and cost-effective cleanups at many of those sites.

in arrogating to itself the authority to override the statutory text on the basis of its own assessment of policy considerations.

Indeed, piecemeal amendment of CERCLA by the courts would have undesirable consequences. For example, the en banc court of appeals' construction of Section 113(f)(1) poses the risk that the contributing party may be subject to double liability. Under CERCLA, a responsible party's voluntary cleanup does not discharge the underlying liability to the United States or a State except as provided in a settlement or federal court judgment to which the United States or a State is a party. See 42 U.S.C. 9613(f)(2); 40 C.F.R. 300.700(g). Hence, a party that is ordered to pay "contribution" in the absence of such a resolution with the government has no guarantee that its payment will discharge its liability, and it remains potentially subject to a future federal or state cost recovery action if any relevant government agency later investigates and determines that the voluntary conduct is inadequate or improper. Indeed, the traditional strictures on contribution are designed to eliminate the prospect of double liability.[14]

Furthermore, the court of appeals' decision effectively creates a new federal cause of action that is not specifically authorized in CERCLA's text. This Court has often warned against the judicial recognition of private rights of action not specifically authorized by Congress. See, *e.g.*, *Alexander* v. *Sandoval*, 532 U.S. 275, 287-288 (2001); *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 67 & n.3 (2001); *Gonzaga Univ.* v. *Doe*, 536 U.S. 273, 283-284 (2002). In particular, the Court has specifically refused to infer federal rights of

[14] See, *e.g.*, Restatement (Third) Torts § 23 (2000), Reporter's Note, cmt. b ("A person seeking contribution must extinguish the liability of the person against whom contribution is sought. See Uniform Contribution Among Tortfeasors Act § 1(d). Otherwise the person against whom contribution is sought would be subject to double liability.").

contribution. See *Texas Indus., Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 639-640 (1981); *Northwest Airlines*, 451 U.S. at 91-95. And it has shown great reluctance to extend existing remedies beyond the limits that Congress has expressly imposed. See, *e.g.*, *Great-West Life & Annuity Ins. Co.* v. *Knudson*, 534 U.S. 204, 208 (2002); *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 19 (1979).

The Court's reluctance to extend statutory remedies rests in large part on "deference to the supremacy of the Legislature." *United States* v. *Locke*, 471 U.S. 84, 95 (1985). Ultimately, the task of reconciling the competing policy interests should be left to Congress. Congress expressed its current policy through Section 113(f)(1)'s text, which adopts the traditional practice of allowing a party to seek contribution only if that party is itself subject to suit. The judiciary's task is "to apply the text, not to improve upon it." *Pavelic & LeFlore* v. *Marvel Entm't Group*, 493 U.S. 120, 126 (1989). The congressional judgment set forth in the statutory text accordingly should control. See, *e.g.*, *Rodriguez*, 480 U.S. at 525-526; see Pet. App. 44a-45a (Garza, J., dissenting). As this Court stated in the context of CERCLA's provisions respecting recovery of attorney's fees, expanding the scope of existing remedies "is a policy decision that must be made by Congress, not the courts." See *Key Tronic*, 511 U.S. at 819 n.13 (quoting *FMC Corp.* v. *Aero Indus., Inc.*, 998 F.2d 842, 847 (10th Cir. 1993)).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
THOMAS L. SANSONETTI
Assistant Attorney General
THOMAS G. HUNGAR
Deputy Solicitor General
JEFFREY BOSSERT CLARK
Deputy Assistant Attorney General
JEFFREY P. MINEAR
Assistant to the Solicitor General
R. JUSTIN SMITH
PAUL S. WEILAND
Attorneys

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